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NO. 86-1346

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT MATCHA AND ANN MORGAN MATCHA,
Petitioners,

V.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals for the
Third Supreme Judicial District of Texas
Sitting in Austin, Texas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America respectfully moves for leave to file the attached brief of amicus curiae pursuant to Rule 42 of the Revised Rules of this Court and would show the Court as follows:

1. *Identity of Amicus Curiae.* The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. It is located on the campus of the South Texas College of Law in Houston and shares certain activities and personnel with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, academics and businesspeople.

2. *Interest of Amicus Curiae.* Among LFA's principal aims are the enhancement of the market system of resource allocation, the attainment of a better balance between the federal government and the States, and the furtherance of individual political and economic liberties.

3. *Previous Appearance in the Texas Court, Below.* LFA appeared as amicus curiae in this case in the Court of Appeals for

the Third Supreme Judicial District of Texas.

4. *Previous Appearance in this Court in a Related Case.* LFA appeared as amicus curiae this term in the case of NOLLAN V. CALIFORNIA COASTAL COMMISSION, No. 86-133, which presented questions closely related to those in the case at bar.

5. *Desirability of an Amicus Curiae Brief.* The case is one of great public importance. The past involvement of this amicus curiae not only in *Nollan* but in other takings cases as well, makes it likely that amicus can assist the Court in developing the issues fully. Amicus here concentrates most heavily upon issues of public policy, and seeks to emphasize the interest of the public in the protection of the private rights involved.

6. *Avoidance of Unnecessary Duplication.* Amicus curiae has carefully reviewed the Petition for Certiorari and Appendix in an effort to avoid unnecessary duplication.

7. *Requests for Consent of Parties.* This amicus curiae timely requested consent of all parties. The consent of Petitioners Robert Matcha and Anne Morgan Matcha has been requested and received, and is submitted herewith. The Respondent has expressly refused to consent to the appearance of this amicus. The letter refusing consent is also submitted herewith. Amicus Curiae accordingly files this Motion pursuant to the Rules of this Court.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements made in paragraphs 1 and 2 of the Motion preceding this brief, as showing the interest of amicus curiae.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case made by Petitioners Robert Matcha and Ann Morgan Matcha.

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court stated that in identifying a "taking," it would consider the economic impact on the individual, the character of the governmental action, the necessity of the action

to promote the "health, safety, morals, or general welfare," and the extent to which the action actually serves a uniquely public function. *Id.* at 124, 125, 128.

These factors correspond to considerations underlying the just compensation requirement, including the policies of protecting the settled expectations of the parties, harmonizing competing social needs, limiting governmental excess, and insuring that the costs of benefits to society as a whole are not to be borne by a small part of society. An analysis of these factors makes clear that the decision below is in conflict with *Penn Central* and other decisions of this Court.

I. THE COSTS OF BENEFITS TO SOCIETY AS A WHOLE SHOULD NOT BE BORNE BY ONLY A SMALL PART OF SOCIETY.

The compensation-for-taking requirement is fundamentally and foremost "a limit on a government's power to isolate particular individuals for sacrifice to the general good," L. TRIBE, AMERICAN CONSTITUTIONAL LAW sec. 9-4, at 463 (1978), as has been forcefully expressed by this Court in *Armstrong v. United States*, 364 U.S. 40 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Id. at 49. The burden being borne by the affected group in *Armstrong* was the inability to enforce certain valid liens on the ground that there "was a total destruction by the Goverment of all value of these liens" which had "every possible element of a Fifth Amendment 'taking' ". *Id.* at 48. In the case at bar, a requirement that Petitioners remove their beach house and land-

scaping, and cease to enjoy their own property, constitutes a virtually total destruction of all the value of their property.[1]

The real question in such cases is not whether the result desired is a beneficial one, but "upon whom the loss of the changes should fall." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922). In making such decisions, it is important to be constantly mindful of the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.*

II. THE POLICY UNDERLYING THE JUST COMPENSATION REQUIREMENT OF LIMITING GOVERNMENTAL EXCESS WOULD BE SERVED BY APPLYING THE REQUIREMENT IN THIS CASE.

One of the policies served by the just compensation requirement is that of preventing governmental excess by causing a governmental body or agency to consider the total societal costs of a proposed action.[2] Indeed, this Court has held that the costs of the proposed action must be weighed against the necessity for the action to promote " 'the health, safety, morals, or

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1 This Court has held in other cases that takings of private property less complete than that involved in this case have been an impermissible sacrifice of private property for the public good. *See, e.g. Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (holding that taking the interest on funds deposited in the registry of a county court in Florida was an unconstitutional taking); *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962) (holding that noise from aircraft making a home at the end of the runway "unbearable" for residential use, constituted an unconstitutional taking of an air easement over the property).

2 D. Hagman, *Outline of Presentation, The Compensation Issue: Theories of Liability for Damages from Planning and Land Use Controls*, ALI-ABA Program, Arlington, Virginia (March 26, 1980).

general welfare.' " *Penn Central*, 438 U.S. at 125. If there is no need to pay for the property taken, the planner tends to focus on only the issues his perceptions cause him to be interested in, without the restraint of weighing the real costs imposed on other individuals and, indeed, on the society as a whole. As this Court has said in discussing the problems created when the right to compensation is qualified by the exercise of the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal, supra*, at 415.

This tendency to take private property without weighing the impact on the individual is especially apparent in this case, in view of the fact that the easement taken under the statute is much greater than is necessary to achieve the stated statutory purpose of preserving the public's right of ingress and egress. Tex. Nat. Res. Code Ann. sec. 61.011 (Vernon 1978). As Petitioners point out, an expert witness for the state testified at the trial below that "the various beach landmarks had recovered to their pre-Alicia location by the time of trial including the sandy beach most used by the public." Petition for a Writ of Certiorari at 10. As the expert testimony further indicates that the vegetation will gradually readjust in a seaward direction, *id.*, there is no apparent justification for requiring Petitioners to remove their improvements in the interim.

The effect of a failure to weigh the costs is seen not only in the fact that the easement being claimed is wider than before, but is also apparent from the implicit statutory indication that a 200 foot easement would be sufficient to protect the public's right of ingress and egress.[3] The statute provides that in areas where the vegetation line is not clearly marked or where it has

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3 In fact, it has been suggested that the statute is subject to an interpretation that "the two hundred foot line is always the maximum extent of the public's easement along the beach." Comment, *Public Access to Receding Beaches*, 13 Hous. L. Rev. 984, 998 (1976).

been obliterated or created artificially, a 200 foot line will be used as the final boundary or as a temporary boundary pending a final determination. Tex. Nat. Res. Code Ann. secs. 61.016 and 61.017 (Vernon 1978). Clearly the legislature considered a 200 foot easement sufficient for its purposes, yet the state is unwilling to consider either the action of a *natural* disaster such as a hurricane an obliteration or to consider Petitioner's plantings as "artificial changes in the natural vegetation of the area," Tex. Nat. Res. Code Ann. sec. 61.017 (Vernon 1978), thus giving them the benefit of the above statutory provisions.

Furthermore, the state's interpretation is not necessary for the purposes of clarity. It is probably clearer to most beachgoers that they should not interfere with a private home[4] than that they should not cross over a line of vegetation which in many instances may be poorly defined.

The danger inherent in making the taking of private property overly attractive by not requiring compensation is eloquently expressed in the following passage:

> One may applaud the idea of a need for increased public recreational areas and still observe that the assertion of public need for private property under our Constitution is an assertion that the public should pay for what it wishes to take. Devices to take private property without compensation carry no guarantee that they will be restricted to tidelands, dry sand areas or the like. The appetite for taking private property for nothing could easily extend inland from tideland areas under the same claims of public need if that is recognized as a reason for taking without compensation.

Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RES. LAW 279, 295 (1977).

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4 *See* Petition for a Writ of Certiorari at 10.

III. THE DECISION BELOW FAILS TO SERVE THE IMPORTANT PURPOSE OF HARMONIZING COMPETING SOCIAL NEEDS.

When monetary constraints are substantially removed from the decision to take private property, there is an increased likelihood that other social costs may also be overlooked. This concern also underlies the compensation requirement. *See generally* Hagman, *supra* at 2. For example, a regulatory taking may remove productive land from its best use; confusion as to the right to rely on one's ownership may make its best use improbable; and jobs, commerce and products may be lost because firms as well as individuals will fear that their interests are unprotected.

The Texas coastline is large enough to accommodate both developed and undeveloped areas, and there are advantages to both. Beach homes, condominiums, and hotels give people a place to stay while enjoying the beach. The quality of life is thereby improved for many citizens, tourism is increased, providing an important economic benefit to the state, and the public image of the state as a state of rich diversity is enhanced as more people visit and enjoy the coastline. The decision below will not, of course, result in a cessation of development of the coastline. Unfortunately, it will surely tend to discourage *quality* development, because of the risk involved in spending large sums on something that can be so capriciously taken away. Yet quality development is especially important in maximizing all the benefits just mentioned.

IV. THE DECISION BELOW DOES NOT COMPORT WITH THE SETTLED EXPECTATIONS OF THE PARTIES.

Finally, the compensation requirement furthers the policy that "certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation." Tribe, *supra* at 456. Furtherance of this policy has been supported by this Court, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Central*, *supra*. These considerations should be considered

particularly relevant in this case, because the policy favoring protection of settled expectations is especially strong when the expectations are "investment-backed expectations." *Penn Central, supra,* at 124-125.

The Court in *Kaiser Aetna* further held that even though the government could have prevented the owners from making the improvements, 444 U.S. at 179, once it had acquiesced in the investment of "substantial amounts of money," *id.* at 176, its conduct had brought about "the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Id.* at 179. Likewise, the state has here acquiesced in the investments made by the Appellants, and it should not now be able arbitrarily to deny them the benefit of those investments. Implicit recognition that homeowners should be put on notice that their property could be taken away can be seen in the notice provision recently added to the Open Beaches Act, Tex. Nat. Res. Code Ann. sec. 61.025 (Vernon Supp. 1986). The provision underscores the importance of making purchasers of property aware in advance of limitations on its use, but it comes too late to help Petitioners herein.

The effect of unpredictable property rules is illustrated by the following analysis of a similar problem in New Jersey:

> Title insurance specialists estimate that between 50,000 and 60,000 individual property owners could be affected if the state chooses to claim title to their land via [the New Jersey decision in] *Sisselman.* The aftermath of the decision could be mildly described as tremendous. The development of the meadowlands has come to an abrupt halt. Companies which were planning extensions of million-dollar plants in the meadowlands can no longer secure title insurance policies. Municipal government revenues are threatened because the taxability of the meadowlands is

> questionable. And residential property owners have been left wondering whether they own the land upon which they have been paying taxes and upon which they have made valuable improvements. One writer described the situation succinctly when he said: "The status is most depressing."

Note, *Tideland Ownership—Time for Reform*, 36 U. Cin. L. Rev. 121, 121 n.4 (1967).

The Petitioners' expectations have been bolstered by the prior decisions in this area. The Supreme Court of Texas made it clear in *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958), that it is necessary to look at "averages over a period of years" in defining property rights in the coastline. *Id.* at 180. The Houston Court of Appeals in *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.), based its decision in important part on the assumption that the vegetation line was stable and had been for at least 200 years, *id.* at 931, and that while there may be "particularly from storms, some erosion on the beach and at points on the vegetation line, such is temporary and the beach and the line of vegetation through the work of nature rebuild in relatively short times." *Id.* Likewise, the Corpus Christi Court of Appeals justified its decision to recognize a public easement in *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App.—Corpus Christi 1979) partly by the "considerable testimony in the record which establishes the stability of the beach in question." *Id.* at 379.

The rolling easement concept is certainly far from an established doctrine, and is in fact presented in the Houston Law Review article previously cited as a "proposed solution" to the problem of a receding shoreline, 13 HOUS. L. REV. at 1006, one lacking "higher court precedent," *id.* at 1008, but whose "time has come." *Id.* Amicus submits that adopting such a "solution" by sacrificing the investment-backed expectations of the property owners in this case is a violation of the compensation clause of the United States Constitution.

CONCLUSION

These considerations should protect the individual property interests at issue in this case. They reinforce the conclusion that an interpretation of the Open Beaches Act that would destroy those interests would infringe the Constitution. At the very least, these policy considerations raise a "substantial" constitutional question, which should be addressed by this Court. Consequently, the Writ of Certiorari should be granted.

Respectfully submitted,

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